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No. 01-164

IN THE

# Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,
*Petitioner,*

v.

JOSEPH P. GRIESSER,
*Respondent.*

**On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad

[1] The letter expressing consent has been filed with the Clerk of the Court.

industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, presents such an issue. The court below followed several other lower courts in attributing to a prior decision of this Court a hard and fast rule prohibiting any mention of the age at which a railroad employee seeking compensation under FELA for future lost wages would have become eligible to receive retirement benefits under the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. §§ 231-231u. When a FELA plaintiff claiming a permanent disability asserts that he or she would have opted for an advanced retirement age but for the injury, such evidence often is proffered to rebut that assertion by suggesting a more realistic, earlier retirement date. However, as a result of this and like rulings in other jurisdictions, petitioner and other railroads are deprived of the right to present highly probative evidence going to a key component of damages in a FELA case. This rule, which is the product of a misapplication of a very limited holding by this Court, confers an enormous and unwarranted disadvantage on railroad defendants in numerous cases arising under FELA.

Because FELA litigation is an ongoing event for all major railroads—with several thousand FELA suits typically filed each year—AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA. When AAR participates in a FELA case like this one as *amicus curiae*, it brings a broad, industry-wide perspective to the issues before the court. AAR works closely with its member railroads to address a host of issues arising under

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[2] *E.g., Consolidated Rail Corp. v. Wicker*, 119 S.Ct. 530 (1998); *CSX Transp., Inc. v. Sirbaugh*, 117 S. Ct. 1289 (1997); *Norfolk & Western Ry. v. Chittum*, 117 S. Ct. 597 (1996); *Metro-North Commuter R.R. v. Buckley*, 117 S.Ct. 379-80 (1996). All granting motion of AAR to participate as *amicus curiae*.

FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends in FELA litigation that confront its members.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's rulings, by bringing the perspective of an entire industry, which often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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**On Petition for a Writ of *Certiorari* to the Superior Court of Pennsylvania**

## BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

*Amicus curiae* Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues and employ 90 percent of rail workers. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

One such matter is the Federal Employers' Liability Act (FELA). 45 U.S.C. §§ 51-60. In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted this tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law to cover employees within its jurisdiction. Under these laws, the concept of assigning fault for workplace injuries has been abandoned in favor of the principle that all employees suffering work-related injuries are deserving of compensation. Today, the railroad industry remains virtually the only one where work-related injuries are compensated under a fault-based system.[2] A key difference between the workers' compensation systems and FELA is that the former cap the amount of compensation available to employees, while the latter permits open-ended damages awards. *See infra* note 18.

FELA is not the only unique federal benefits statute applicable to the railroad industry. Unlike virtually all other participants in the American workforce, railroad employees are not covered by the Social Security System, but instead are covered by the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. §§ 231-231u. Like the Social Security System, the RRA provides a pension to retired rail employees who have the requisite years of creditable service. The RRA allows for retirement with full benefits at an earlier age than does the Social Security System.[3] Two types of disability benefits also

---

[2] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[3] Retirement with full benefits is available to Social Security beneficiaries at age 65, and the Social Security "retirement age" is set to increase gradually. 42 U.S.C. § 416(l) In contrast, under the RRA, an employee with 30 years of service can retire at age 62 with full benefits, or at age 60 with a reduced benefit. *See* 45 U.S.C. §§ 231a(a)(1)(ii) and 231b(a)(3).

are available under the RRA to railroad employees suffering a disability rendering them unable to work.[4]

Each year thousands of claims and lawsuits are asserted under FELA against AAR members and other railroads.[5] In addition to offering evidence of the railroad's negligence or the employee's comparative negligence,[6] the parties often will vigorously contest the amount of damages suffered by the plaintiff. In many cases, as in the case below, the injured employee alleges a permanent disability and seeks compensation covering lost wages for the remainder of his or her projected work life.

Whether, and the extent to which the plaintiff is injured, as well as the amount of compensation owed, are issues generally decided by the jury. Whenever the plaintiff alleges that he or she cannot return to work, the jury must decide how much earning capacity has been lost. Thus, a jury determination on how many additional years, but for the injury, the plaintiff would have worked can have a significant impact on the outcome.

In this case, a state appellate court, overturning a ruling by the trial judge, prohibited the defendant from introducing a key piece of evidence going directly to the issue of when the plaintiff would have retired, *i.e.*, the age at which he would have been eligible to retire with full benefits under the RRA. The railroad sought to introduce this evidence to rebut assumptions about the age at which the plaintiff would have

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[4] Railroad employees who are unable to work in their regular occupation may qualify for an occupational disability benefit under 45 U.S.C. § 231a(a)(1)(iv); those unable to work at any job may qualify for a total disability benefit under 45 U.S.C. § 231a(a)(1)(v).

[5] In 1999, 4,970 FELA lawsuits were filed. (Data on FELA lawsuits are derived from information provided to AAR in response to annual surveys of AAR members and other railroads.)

[6] Under FELA, damages must be reduced in proportion to the employee's negligence in causing the injury. 45 U.S.C. § 53.

retired, made by the plaintiff's economist when testifying about the plaintiff's future wage loss. Nonetheless, the court below reasoned that it was compelled to exclude this evidence by a decision of this Court when, in fact, that decision never addressed the issue.

The case below represents an alarming trend in which lower courts, employing faulty logic, have extended a limited holding of this Court to formulate a rule never contemplated nor supported by any prior decisions of this Court. *See infra* note 19. This unwarranted expansion of the collateral source rule places railroads at a distinct disadvantage with respect to a key trial issue, which has a direct and significant impact on the size of damages awards in many FELA cases. Nothing in either the text of FELA or prior decisions of this Court warrants the *per se* exclusionary rule countenanced by the court below. AAR members, therefore, have a strong interest in seeking review of this case as a means of restoring balance and equity to litigation under FELA.

## STATEMENT OF THE CASE

*Amicus* adopts the statement of the case in petitioner's brief.

## SUMMARY OF THE ARGUMENT

The ruling below is the product of a misapplication of this Court's limited holding in *Eichel v. New York Cent. R.R.* In *Eichel,* this Court held that the trial court had properly used its discretion in excluding evidence of the plaintiff's receipt of occupational disability benefits under the RRA. The Court below, believing that *Eichel* set forth a broad, *per se* rule requiring the exclusion of evidence of any and all benefits that might be available to railroad employees under the RRA, prohibited the defendant from rebutting the plaintiff's assumption about when he would have retired with evidence of the age at which the plaintiff would have been eligible to retire with full RRA benefits.

*Eichel* characterized RRA disability benefits as a collateral source was based on an unchallenged assumption that such benefits are not attributable to the employers' contributions: in fact, railroad employers contribute three-quarters of the funding for occupational disability benefits. Inasmuch as the characterization of RRA occupational disability benefits as a collateral source is questionable, the *Eichel* decision should not be expanded to cover RRA retirement pensions which, as they are not compensation for the injury suffered, bear none of the markings of a collateral source. Evidence about the availability of a retirement pension at a certain age is probative of the age at which the plaintiff would have decided to retire. Moreover, there is no logical reason to assume such evidence would be prejudicial, or confusing to a jury, nor does *Eichel* compel a conclusion that it would be. The unwarranted extension of *Eichel* by the court below to prevent a FELA defendant from using a key piece of evidence going to the issue of damages puts railroads at a distinct disadvantage, and cannot be sustained by either prior decisons of this Court or the language or policies of FELA.

Prohibiting railroad defendants from utilizing evidence of when the plaintiff would have been entitled to retire under the RRA to rebut evidence proffered by the plaintiff, has a significant impact on the level of damages that are awarded in FELA cases. Lost earning capacity often is a major element of damages in a FELA suit-juries have awarded over $1 million for lost earnings alone in recent cases-and the plaintiff's remaining worklife, *i.e.*, the age at which the plaintiff would have retired but for the injury, is an important factor in a jury's determination of lost earning capacity. Without the ability to offer evidence to rebut plaintiffs' assertions about retirement expectations, railroads face the prospects of overcompensating FELA plaintiffs for claimed lost future earnings. Only this Court can correct the misapplication of its *Eichel* decision which has led to this result.

## ARGUMENT

### I. THIS COURT SHOULD REVIEW THE RULING BELOW BECAUSE IT IS AN UNWARRANTED AND ILLOGICAL EXPANSION OF ITS LIMITED HOLDING IN *EICHEL V. NEW YORK CENTRAL* WHICH UNFAIRLY PUTS FELA DEFENDANTS AT A DISTINCT DISADVANTAGE

#### A. The Lower Court's Reliance On *Eichel* Is Misplaced Because This Case Presents An Entirely Different Issue Than Did *Eichel*

In a case decided under the FELA nearly sixty years ago, Justice Frankfurter observed that

> a phrase begins a life as a literary expression; its felicity leads to its lazy expression; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.[7]

The decision below demonstrates that this observation can apply to not just a "phrase", but to an entire decision of this Court. A limited holding of this Court, the underlying premise of which was never at issue in the case, has been transformed by lower courts into an all-encompassing exclusionary rule of evidence which gives FELA plaintiffs an evidentiary "free pass" never intended by Congress.

In 1963, this Court held in *Eichel v. New York Cent. R.R.*, 375 U.S. 253 (1963), that evidence of receipt of disability benefits under the RRA could not be admitted to show that a FELA plaintiff who alleged he was permanently injured, in fact, had other motivation for not returning to work.[8] This Court held that the trial court properly found that the prejudicial effect of the evidence outweighed its probative

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[7] *Tiller v. Atlantic Coast R.R.*, 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring).

[8] "*Eichel v. New York Cent. R.R.*, 319 F.2d 12, 18 (2nd Cir. 1963).

value. Having sought to introduce the evidence for the limited purpose of showing malingering by the plaintiff, the defendant never took the position in court that receipt of RRA disability benefits could be used to reduce wage loss damages. Given this "concession,"[9] and finding that more probative evidence on the issue of malingering likely existed, this Court concluded that the likelihood the jury might misuse the evidence for the improper purpose of reducing damages warranted its exclusion. *Id.* at 255.

Though the court below relied on *Eichel*, this case involves a different kind of benefit than did *Eichel*, which is relevant to a completely different trial issue. The benefit at issue in *Eichel* is available to railroad employees suffering disabilities (including disabilities suffered in the course of employment), rendering them unable to perform their normal occupation. *See supra* note 4. This occupational disability benefit, a benefit which is not available to workers covered by the Social Security System, is available to employees with twenty years of service in the railroad industry and is funded primarily by the employer.[10]

The benefits at issue in this case, also available under the RRA, have nothing to do with a disability, but rather provide for a retirement pension to qualifying railroad employees. Employees with 30 years of service may retire with full benefits at age 62, *see supra* note 3; in contrast, only reduced

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[9] "Respondent does not dispute that it would be highly improper for the disability pension to be considered in mitigation of damages suffered by petitioner." 375 U.S. at 254.

[10] The primary source of funding of RRA benefits is a two-part payroll tax levied on railroad employers and employees. Employers and employees make equal contributions under Tier I of the tax. 26 U.S.C. §§ 3201(a) and 3221(a). However, the employer contributes about three-quarters of the Tier II tax (16.1% of a 21% tax on the first $59,700 (in 2001) of each employee's earnings). 26 U.S.C. § 3221(b). Like all RRA benefits with no Social Security equivalent, occupational disability benefits are funded out of Tier II taxes.

retirement benefits are available to Social Security recipients at age 62. 42 U.S.C. § 402(q). Moreover, under the RRA, there is a second level of retirement benefit, which like the occupational disability benefits are funded out of the Tier II payroll tax. 45 U.S.C. § 231b(b).

Unlike the benefits in *Eichel*, the retirement benefits raised by petitioner at trial were not being paid on account of the injury. Moreover, the evidence here was offered directly to rebut evidence introduced by the plaintiff. The trial court understood these distinctions and admitted the evidence. On appeal, recognizing the differences between retirement and disability benefits, the court below all but admitted that *Eichel* was not on point and that its rationale did not apply. *Griesser v. National R.R. Passenger Corp.*, 761 A.2d 606, 610 (Pa. Super. 2000). Nonetheless, the court concluded that *Eichel* prohibits a railroad from even making mention of the age at which a FELA plaintiff would have been eligible to retire with full benefits under the RRA. The appellate court held that under *Eichel* "evidence of collateral source benefits 'must be categorically excluded.'" 761 A.2d at 611.

The broad exclusionary rule which the court below ascribed to *Eichel* distorts that decision beyond all recognition. Not only does the decision below go far beyond *Eichel*'s limited holding, that holding itself is a product of assumptions which never were subject to argument or briefs before this Court. Therefore, this Court should review the decision below to correct repeated misinterpretations of a prior decision which have denied railroads the right to offer a full defense under a federal statute.

### B. The Rationale for the Collateral Source Rule Does Not Apply to Evidence of Benefits Available to Railroad Employees Under the RRA

Benefits that are received, or that may be received at some future time, by a railroad worker pursuant to the RRA should

not be viewed as a collateral source. Under the collateral source rule, recognized by the Supreme Court nearly a century and a half ago[11] if a plaintiff has a source of payment independent of the tortfeasor compensating for some of the losses suffered, the tortfeasor is prohibited from deducting the collateral source from the damages owed to the plaintiff. 22 Am. Jur. 2d *Damages*, § 566 (1988). The collateral source rule is based on the policy that even though the plaintiff is being compensated for part of the loss suffered as the result of the defendant's negligence and, therefore, would be made more than whole if compensated for the same loss by the defendant, the tortfeasor should not benefit from this fortuity. This policy is most compelling where the plaintiff, by having procured insurance against the loss suffered, is the source of the collateral benefit. However, this rationale does not hold where the tortfeasor is the source of the collateral benefit, as in that case, the tortfeasor is not escaping the full brunt of its negligent conduct. *See A.H. Bull Steamship Co. v. Ligon*, 285 F.2d 936, 937 (5th Cir. 1960).[12]

In *Denver & Rio Grande Western R.R. v. Green*, 59 F.3d 1029, *cert. denied*, 516 U.S. 1009 (1995), one of the cases following *Eichel*, the Tenth Circuit explained that

> The collateral source rule allows a plaintiff to seek full recovery from a tortfeasor even though an independent source has compensated the plaintiff in full or in part for the loss. The rationale for the rule is at least two-fold: First, public policy favors giving the plaintiff a double recovery rather than allowing a wrongdoer to enjoy

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[11] *The Propeller Monticello v. Mollison*, 58 U.S. (17 How.) 152 (1854).

[12] Moreover, the rationale and efficacy of the collateral source rule has come under recent criticism. *See* Petition at 18, n.13. In *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997), this Court questioned the wisdom of permitting a full tort remedy for medical monitoring of the plaintiff's allegedly exposed to asbestos when such relief might already be available through insurance or governmental regulation. *Id.* at 442.

> reduced liability simply because the plaintiff received compensation from an *independent source* (emphasis supplied) [citation omitted]. Second, by assuring a plaintiff's payments from a collateral source will not be reduced by a subsequent judgment, the rule encourages the maintenance of insurance. [citation omitted].

59 F.3d at 1032.

The language of the *Eichel* decision suggests that this Court saw RRA disability benefits as being a collateral source because they were independent of the railroad ("the benefits received . . . are not directly attributable to the contributions of the employer," 375 U.S. at 254). This assumption was never challenged by the New York Central because it never attempted to offset the disability benefits against the plaintiff's damages.

Because it was never at issue in *Eichel*, the notion that RRA occupational disability benefits are a collateral source, and therefore may not be considered in mitigation of FELA damages, was never an issue in controversy before this Court. The assumption that these benefits are "not attributable to the employer," is belied by the substantial contributions railroad employers make to fund the benefit: over three-quarters of the funding for occupational disability benefits is attributable to railroad employer contributions. *See supra* note 10. Thus, the notion, accepted nearly universally by lower courts, that they are without discretion to do anything but exclude evidence of any benefits received by a railroad worker is premised on a dubious characterization of RRA benefits. This unexamined premise, however, undergirded the *Eichel* Court's conclusion that the prejudicial effect of evidence of receipt of RRA occupational disability benefits outweighs its probative value: a conclusion which the court below extended

to prohibit petitioner from introducing important evidence related to a different type of RRA benefit.[13]

### C. Evidence of a Plaintiff's Eligibility for a Retirement Pension Under the RRA Often is of Great Probative Value in a FELA Case and Will Not Confuse the Jury

Regardless of whether occupational disability benefits a FELA plaintiff is eligible to receive on account of his or her injury before reaching retirement age is a collateral source, the RRA age and service pension, which respondent would have been eligible to receive upon retirement from the railroad industry, should never be subject to exclusion under *Eichel* or any version of the collateral source rule. A key element of the collateral source rule is that the payment in question is being made to compensate the plaintiff for the same loss for which compensation is being sought from the tortfeasor. However, the relevance of retirement benefits to a FELA case is not as a payment to cover a loss also recoverable under FELA, but rather, as evidence of when the plaintiff would have voluntarily ended his railroad employment. This is highly relevant because the age at which the plaintiff would have "retired" if he had not been injured is essential to determine the extent of the wages lost as a result of the injury. While the age at which the plaintiff would have been eligible for a retirement benefit is not necessarily dispositive of when he would have voluntarily ended his railroad employment—some employees work beyond the date at which they would be eligible to retire with a pension—it is at least highly probative.

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[13] It is the position of AAR that when the opportunity presents itself, this Court should reexamine its *Eichel* decision by examining the underlying premise that RRA occupational disability benefits are a collateral source and may not be offset against wage loss damages (or introduced for other purposes) because they are not attributable to the contributions of the employer.

Not only is this evidence highly probative, there is no logical reason why evidence of when a railroad employee would have been eligible to retire with full benefits would be prejudicial. In *Eichel*, the Court was concerned that if the defendant was permitted, for the purpose of showing malingering, to elicit testimony that the employee was receiving disability benefits which would have been forfeited had he returned to work, the jury might have been inclined to take that into account when calculating damages or even when assessing liability. There is no logical reason to assume that a jury would have taken that course in the case below.

The distinction between a retirement pension and a disability benefit are straightforward and well known to lay jurors. Practically every American who is, or has been, employed (outside the railroad industry) participates in the Social Security System which provides retirement income upon reaching the statutory retirement age, and which also provides disability benefits. Thus, jurors would be generally familiar with the concept of disability benefits, which typically pay compensation when the beneficiary is disabled and unable to work. There is no reason to believe that jurors cannot distinguish this concept from retirement pensions, which are payable when an employee has reached a certain age and decides to retire, or understand the impact that the availability of a retirement pension might have on an individual's decision to remain employed or to retire.

Nonetheless, the court below, and some other lower courts, have assumed that the jury would be confused, and consequently might misuse evidence of the plaintiff's entitlement to retirement benefits. The court opined that

> the jury could conclude that Amtrak was liable for lost wages to age 65 or 70, but then decline to award such damages because of the fortuitous existence of equivalent retirement benefits. Or, the jury could conclude that Appellant was entitled to benefits only to age 60 and

> was attempting to seek a double recovery of benefits after age 60.

*Griesser*, 761 A.2d. at 612. There is no legal or logical reason for allowing such an assumption to be the basis for excluding probative evidence on an important issue. The jury could only have concluded that Amtrak was liable for lost wages until age 65 or 70 if it concluded the plaintiff would have continued to work until those ages. If the jury concluded the plaintiff would have retired at age 60, it would have been compelled to deny lost wages for any period beyond attaining that age.

Where the employee has introduced evidence with regard to his intended retirement date (either by his own testimony or that of an expert witness), the railroad must have the right to rebut that evidence if it believes the plaintiff would have been more likely to retire at an earlier date. Inasmuch as the date at which a worker will be eligible to retire with a full pension is a good indicator of when he actually will retire,[14] prohibiting the railroad from introducing that evidence puts it at a great disadvantage on an extremely important issue in many FELA cases. *See infra* Part II.

Even courts which strictly adhere to the rule that RRA disability benefits are a collateral source, have nonetheless recognized that simple fairness requires that when the plaintiff has introduced evidence of a particular fact that may be rebutted by evidence of his or her receipt of a benefit, that evidence must be allowed. For example, where the plaintiff has injected his/her financial condition into the case, by

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[14] Patrick J. Purcell, *Older Workers: Employment and Retirement Trends*, MONTHLY LAB. REV. 19, 29 (Oct. 2000) ("Empirical evidence indicates that more retirements occur at age 62—the earliest age at which reduced retired worker benefits are available—and at age 65—the earliest date at which full retired workers benefits are available—than at other ages."); Natalie Kramer, *Employee Benefits for Older Workers*, MONTHLY LAB. REV. 21, 25 (April 1995) (noting that an important factor in deciding when to retire is the amount of retirement benefits available).

testifying to the lack of financial resources, the defendant may introduce evidence of receipt of RRA disability benefits to show that, in fact, the plaintiff is not impecunious. *Lange v. Missouri Pac. R.R.*, 703 F.2d 322 (8th Cir. 1983); *Gladden v. Henderson & Co.*, 385 F.2d 480 (3rd Cir. 1968); *Moore v. Missouri Pac. R.R.*, 825 S.W.2d 839 (Mo. Banc 1992). In *Gladden*, the court reasoned that "the collateral benefit rule cannot be made a springboard from which a plaintiff may go forward with affirmative evidence . . . and then seek immunity from cross-examination regarding it. 385 F.2d at 484.

Similarly, when a FELA plaintiff has put forth evidence of when he or she would have retired, the defendant should be permitted to rebut such evidence with reference to the date on which retirement benefits would have been available under the RRA. Permitting this evidence would not only restore balance to FELA litigation, it would be consistent with the underlying policy of FELA of providing compensation only for the actual loss suffered. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980) (Defendant is permitted to introduce evidence of the effect of income taxes on lost wages so the jury will not overcompensate the plaintiff.); *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 71 (1913).

### D. Eichel Does Not Prohibit Trial Courts From Using Their Discretion to Balance the Probative Value of Evidence of RRA Benefits Against Possible Prejudicial Effects

Rather than prohibiting a balancing test, *Eichel* utilized a traditional balancing analysis in upholding the discretion exercised by the trial court in that case:

> In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence . . . . there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension . . . . Similarly, we must recognize that the petitioner's receipt of collateral social

> insurance benefits involves a substantial likelihood of prejudicial impact. We hold therefore that the District Court properly excluded the evidence of disability payments.

*Eichel,* 375 U.S. at 255. It is clear that *Eichel* did not adopt a bright-line *per se* rule of exclusion. Instead, this Court simply held that the trial judge properly applied the balancing test, now required under Fed. R. Evid. Rule 403, and, therefore, did not abuse its discretion in excluding the evidence.[15]

While some courts have misread *Eichel* as standing for a *per se* rule of exclusion,[16] others have recognized that *Eichel* is consistent with a balancing analysis, creating a split in the Circuits on this issue. *See* Petition at 21-22. In *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838 (1st Cir. 1998), the First Circuit reviewed the trial judge's decision to admit evidence of the plaintiff's receipt of RRA benefits for abuse of discretion, properly interpreting *Eichel* as requiring that the admissibility of this evidence be subjected to the Rule 403 balancing test:

> We do not read *Eichel* as requiring the per se exclusion of collateral source evidence in FELA cases. . . . [T]he narrower question in *Eichel* was simply "whether or not to uphold the district court's discretionary ruling." [citation omitted]. Indeed, although the Supreme Court decided *Eichel* prior to the enactment of the current Federal Rules of Evidence, the analysis in the *Eichel*

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[15] Rule 403 vests in the trial judge broad discretion to exclude relevant evidence, the probative value of which is outweighed by its prejudicial impact on the party opposing its admission.

[16] *See e.g., Green supra*; *Wilcox v. Clinchfield R.R.*, 747 F.2d 1059 (6th Cir. 1984); *Sheehy v. Southern Pac. Transp. Co.*, 631 F. 2d 649 (9th Cir. 1980) ("[c]ourts have consistently interpreted *Eichel* to preclude admission of evidence of collateral benefits...the discretion normally applicable to admit all relevant evidence of collateral benefits is greatly limited in FELA cases." 631 F. 2d at 651-652).

> decision "does not appear inconsistent with Rule 403." [citation omitted]. . . . We do not believe that the *Eichel* court established a bright-line rule barring the admission of collateral source evidence on the issue of malingering. The Supreme Court simply determined that the district (sic) court abused its discretion because the prejudicial impact of the evidence outweighed its probative value. Here, we come to the opposite conclusion.

136 F.3d 838, 841 (1998).

In contrast, the reliance by the court below on *Hileman v. Pittsburgh & Lake Erie R.R.*, 685 A.2d 994 (Pa. 1996), to support its conclusion that it is impermissible to balance the probative value of evidence related to RRA benefits against the likelihood of prejudice, is misplaced. In *Hileman* the court held it was improper to advise the jury that the plaintiff was not eligible to receive workers' compensation benefits. By analogy, the court below reasoned that it was similarly impermissible to advise the jury of the plaintiff's eligibility for retirement benefits under the RRA.

These situations are distinguishable. In a FELA suit, the employee's ineligibility for workers' compensation benefits is entirely irrelevant. Congress has determined that rail employees are entitled to compensation for work-related injuries only if the injury results from the employer's negligence,[17] regardless of whether the worker is without another source of compensation. Advising of a worker's ineligibility can only serve the purpose of causing the jury to look for a reason to award compensation; it has no bearing whatsoever on the employer's liability or the level of damages. Thus, there is no probative value to balance against the prejudicial effect. *Stillman v. Norfolk & Western Ry.*, 811 F.2d 834 (4th Cir.

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[17] FELA "does not make the employer the insurer of the safety of his employees while they are on duty." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947).

1987); *Weinell v. McKeesport Commuter R.R.*, 411 F.2d 510 (3rd. Cir. 1969).

On the other hand, the age at which a rail employee would have been eligible for RRA retirement benefits is very pertinent to the question of when the employee would have decided to retire and cease earning wages and, therefore, to an element of damages. In fact, since most members of a jury are likely to be far more familiar with the Social Security System than with the RRA, they may harbor misimpression about the latter and erroneously assume that normal retirement age under the RRA is the same as under Social Security. In fact, the RRA permits retirement at full benefits at an earlier age than does the Social Security System. *See supra* note 3. Without information about the former, the jury will be misled about the extent of a FELA plaintiff's wage loss.

Since the adoption of Fed. R. Evid. Rule 403, a balancing test is the standard by which the admissibility of a plaintiff's receipt of collateral source benefits should be judged. This Court should review this case in order to clarify this aspect of its *Eichel* decision and unburden the lower courts from the shackles some have imposed on themselves by their improper readings of *Eichel*.

## II. THIS COURT SHOULD REVIEW THIS CASE BECAUSE EXCLUDING EVIDENCE ON WHEN A FELA PLAINTIFF WOULD BE ELIGIBLE TO RETIRE WITH A FULL RRA AGE AND SERVICE PENSION WILL HAVE A SIGNIFICANT IMPACT ON THE OUTCOME OF MANY FELA CASES

This court should clarify its *Eichel* decision because its misapplication by the court below will have a tremendous impact on the level of damages awarded in many of the thousands FELA suits filed each year. A fundamental difference between FELA and workers' compensation is that

the latter generally caps the amount of wage loss benefits payable, while under FELA there are no such limits.[18] Thus, not only can FELA verdicts be substantial, a major component of any FELA suit where a disabling injury is alleged is future lost wages (or earning capacity) of the plaintiff. This amount is arrived at by determining the plaintiff's remaining work life and the difference between what the plaintiff was earning before the injury and his or her earning capacity in the future, subject to a duty to mitigate damages. *See DeBiassio v. Illinois Cent. R.R.*, 52 F.3d 678, 687-88 (7th Cir. 1995)

Verdicts for substantial future lost wages, running well over $1 million, are frequently returned by FELA juries. *E.g.*, *DeBiassio supra* (award of $1.15 million for future lost earnings upheld.); *Maliska v. Southern Pac. Transp. Co.*, No. B-153, 936 (Jefferson Cty. Dist. Ct., Beaumont, Tx. 1998) (awarding $2 million for future wage loss), *reprinted* in 18 No. 7 Verdicts, Settlements & tactics 307 (July 1998); *Crouch v. CSX Transp., Inc.*, No. L 94-1055 (Portsmouth, Va. Feb. 10 1997) ($12 million awarded to plaintiff whose future wage loss claim had a present value of $1.3 million), *reprinted* in 17 No. 5 Verdicts, Settlements & Tactics 31 (May 1997). Thus, the assumptions juries make when

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[18] "[T]he amount of compensation for disability depends on the workers' previous earning level, for most acts award a percentage of average wage, somewhere between a half and two thirds. But practically all acts also set a maximum in terms of dollars per week . . ." 1 A. LARSON & K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.03[5] (2000 ed.). "It was never intended that compensation payments [under workers' compensation] should equal actual loss, if for no other reason than that such a scale would encourage malingering." *Id.* On the other hand, a compensatory damages award under FELA will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993). ($1.75 million verdict, including over $1 million in intangible damages, not excessive).

calculating wage loss damages play an important role in the outcome of a case.

When the parties offer the jury different assumptions about when, but for the injury, the plaintiff would have retired, and thus, ceased to earn wages from the railroad, a substantial amount of money may be at stake. *See* Petition at 20, n. 16. Therefore, it is essential the jury have some basis for deciding which assumption is more likely. In FELA cases, juries typically are given wide discretion to make determinations of fact, *see Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957), including questions about the extent of damages suffered. *Schirra v. Delaware, L. & W. R.R.*, 103 F.Supp. 812, 823 (M.D. Pa. 1952); *Seaboard Coast Line R.R. v. Gillis*, 321 So.2d 202, 208 (Ala. 1975). Remarkably, the court below saw fit to deny the jury important evidence directly related to the extent of the damages suffered, on the unsupported assumption that it would confuse the jury.[19] This Court has never suggested, nor is there any reason to assume, that juries are likely to confuse the purpose of retirement benefits with disability benefits to the point where evidence of the former must be categorically excluded despite its relevance to an important issue in many cases.

Prior to *Eichel*, lower courts freely used their discretion to permit the introduction of evidence of the age at which an employee would have been eligible for retirement benefits. *Murray v. N.Y., N.H. & Hartford R.R.*, 255 F.2d 42 (2nd Cir.

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[19] Other courts have taken it upon themselves similarly to expand *Eichel*. *See Brumley v. Federal Barge Lines, Inc.*, 396 N.E.2d 1333 (Ill. App. 1979) (Jones Act case) ("The possibility of prejudice resulting from the admission of social security and retirement benefits is readily apparent. The jury could easily confuse the purpose for which such evidence was admitted." *Id.* at 1340.); *Lee v. Consolidated Rail Corp.*, 1995 WL 734108 (E.D. Pa. 1995); *Kimmen v. Consolidated Rail Corp.*, 1999 WL 148360 (E.D. Pa. 1999)).

1958) (A plaintiff's "pension rights were relevant to a determination of his probable lost future earnings." *Id.* at 45.); *See also Reiner v. Northern Pac. Terminal Co.*, 259 F.2d 438, 440-41 (9th Cir. 1958); *Simmons v. Union Terminal Co.*, 290 F.2d 453 (5th Cir. 1961). The consequence of the subsequent retreat from this logic is greatly to inflate in many FELA cases the level of damages for which railroads are liable.

Only this Court can correct the prevailing assumption by lower courts that they have been stripped by *Eichel* of their normal discretion to weigh the probative value of evidence. This Court has granted *certiorari* in other cases to address claims that the lower courts misconceived the meaning of a prior Supreme Court decision. *See e.g.,Wilkinson v. United States*, 365 U.S. 399 (1961)("We granted certiorari [citation omitted] to consider the petitioner's claim that the Court of Appeals misconceived the meaning of the Barenblatt [v. United States] decision." *Id.* at 401.); *Johnson v. United States*, 333 U.S. 46 (1948) ("This case is here on a petition for a writ of certiorari which we granted because of the seeming misapplication of Jesionowski v. Boston & M.R. Co. [citation omitted]." *Id.* at 47.) There could not be a starker example than the case below of a lower court misconceiving a decision of this Court with persistent and recurring real world consequences.[20]

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in this case should be granted.

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[20] This Court also has granted *certiorari* in other recent cases to assure that lower courts interpret FELA correctly. *E.g., Norfolk & Western Ry. v. Hiles*, 516 U.S. 400 (1996); *Consolidated Rail Corp v. Gottshall*, 512 U.S. 532 (1994); *Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330 (1988).

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